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No. 82-6419

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS ROBERT LACHER,

Appellant,

VS.

CITY OF BEMIDJI,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

The Honorable Terrance C. Holter moves the Court to dismiss the appeal herein or, in the alternative, to affirm the order of the Supreme Court of Minnesota. The grounds for this motion are that there are adequate nonfederal grounds for the decision below and that appellant has not presented a substantial federal question.

QUESTIONS PRESENTED

(1) Can adequate nonfederal grounds account for the Minnesota Supreme Court's denial of appellant's petition for a writ of prohibition?

(2) Does the United States Constitution prohibit a Minnesota county court from requiring an acquitted defendant to pay attorneys fees for his court-appointed attorney?

STATEMENT OF THE CASE

This is an appeal from an order of the Minnesota Supreme Court denying a petition for a writ of prohibition.

The matter arises out of a criminal trial before the Honorable Terrance C. Holter, a judge of Beltrami County Court in Minnesota. Appellant Lacher was the defendant therein. At Mr. Lacher's request and based upon a financial inquiry form he completed, the court appointed an attorney to represent Mr. Lacher. On October 1, 1982, Mr. Lacher was found not guilty. On that same date, pursuant to Minn. Stat. §§ 611.20 and 611.35 (1982) and Rule 5.02, subd. 5 of the Minnesota Rules of Criminal Procedure, Judge Holter issued an order requiring that Mr. Lacher reimburse the county for the attorneys fees of his court-appointed counsel (\$288).

On October 26, 1982, Mr. Lacher made a partial payment of \$5. The court then asked that he make monthly payments of not less than \$25 starting November 1, 1982. Mr. Lacher failed to make any further payments. On December 30, 1982, the Deputy Clerk of Court wrote to him requesting that he either pay the money which was then due or appear in court on January 10, 1983 to show cause why he had not paid the fees. Mr. Lacher did not pay the amount due or appear in court to challenge the payments or to explain his failure to make them. Instead, he filed with the Minnesota Supreme Court a petition for a writ of prohibition restraining Judge Holter from enforcing his order of October 1, 1982.

On January 28, 1983, the Minnesota Supreme Court denied the petition for a writ of prohibition. That order has now been appealed to this Court.

ARGUMENT

I. ADEQUATE NONFEDERAL GROUNDS SUPPORT THE DECISION OF THE MINNESOTA SUPREME COURT.

The decision of the Minnesota Supreme Court which is presently on appeal does not contain any opinion or statement of reasons. In order for this Court to hear the appeal, appellant must establish jurisdiction by showing that adequate non-federal grounds cannot account for the decision. *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). As shown below, appellant has failed to satisfy this requirement.

The state court may not have considered the federal constitutional issues and instead based its decision solely upon independent and adequate state grounds. Under Minnesota state law, a petition for a writ of prohibition may be denied without reaching the merits of any constitutional claims if the petitioner fails to establish the unusual circumstances which are required for the granting of such a writ. Indeed, it has long been the practice of the Minnesota Supreme Court (like many other courts) to avoid basing its decisions on constitutional grounds so long as there are adequate non-constitutional bases. See, e.g., *Head v. Special School Dist. No. 1*, 288 Minn. 496, 182 N.W.2d 887 (1970), *cert. denied* 404 U.S. 886 (1971).

According to the Minnesota Supreme Court, a writ of prohibition is an "extraordinary writ" which "issues in the discretion of the court only in extreme cases where the law provides no other adequate remedy . . ." *Griggs, Cooper & Co., Inc. v. Lauer's, Inc.*, 264 Minn. 338, 341, 119 N.W.2d 850, 852 (1962). To obtain the writ, a petitioner must show that a court is about to exercise unauthorized judicial power which will

result in injury for which there is no other adequate remedy. *Id.* If an appeal will give an adequate remedy, a writ of prohibition will not be issued. *See, e.g., Marine v. Whipple*, 259 Minn. 18, 104 N.W.2d 657 (1960).

In the instant matter, the Minnesota Supreme Court's discretionary denial of the petition for a writ of prohibition is supported by the existence of adequate alternative state court remedies. The Minnesota Supreme Court might have decided that Judge Holter's original order imposing attorneys fees could have been adequately reviewed on appeal. Furthermore, the Court could have concluded that an appeal would also be adequate to review any order issued after the hearing scheduled for Mr. Lacher to show cause why the fees were not being paid. That conclusion is eminently sensible in light of the fact that there is no indication that Judge Holter was even informed of Mr. Lacher's constitutional challenge. Furthermore, Mr. Lacher did not attend the January 10, 1983, county court hearing to contest the attorney's fees order or to explain his position. It is certainly plausible that, had he attended the January 10 hearing, he would have had an opportunity to persuade Judge Holter that his economic status necessitated a postponement or forgiveness of the attorney's fees. *Cf., Jurisdictional Statement at 4.* Instead, Mr. Lacher chose to by-pass normal procedures by seeking an extraordinary remedy that is simply not appropriate in these circumstances under Minnesota law.

Thus, it is likely that the decision of the Minnesota Supreme Court on review herein was based upon the extraordinary nature of a writ of prohibition, a nonfederal ground. Since the state court probably did not consider the federal constitutional issues in rendering its decision, this Court should decline jurisdiction and dismiss the appeal.

II. APPELLANT FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Even if this Court decides that the decision of the Minnesota Supreme Court was not based on an adequate nonfederal ground, it should dismiss or affirm for lack of a substantial federal question. Appellant suggests that the recoupment order violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. Jurisdictional Statement at 2, 11. As shown below, the order requiring Mr. Lacher to pay attorneys' fees does not violate those provisions. Therefore, the appeal should be dismissed or the decision below affirmed.

A. An Order Which Requires an Acquitted Defendant to Pay Attorneys Fees Does Not Violate Due Process.

Appellant's main argument appears to be that the recoupment of attorneys fees from an acquitted defendant violates due process because it "shocks the conscience." Jurisdictional Statement at 5-6. Apparently, appellant believes that a recoupment order shocks the conscience because it chills the exercise of the right to counsel guaranteed by the Sixth and Fourteenth Amendments. Jurisdictional Statement at 7-8, 10. Based upon this Court's clear statements in *Fuller v. Oregon*, 417 U.S. 40 (1974) and *James v. Strange*, 407 U.S. 128 (1972), this argument should be summarily rejected.

In *James v. Strange*, 407 U.S. 128, 141 (1972), this Court recognized the legitimate and important state interests in recoupment statutes:

The Court assumed in *Rinaldi [v. Yeager]*, 384 U.S. 305 (1966)], *arguendo*, "that a legislature could validly provide for replenishing a county treasury from the pockets

of those who have directly benefited from county expenditures." *Id.*, at 309, 86 S.Ct. at 1500. We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs. Finally, federal dominance of the Nation's major revenue sources has encouraged state and local governments to seek new methods of conserving public funds, not only through the recoupment of indigents' counsel fees but of other forms of public assistance as well.

(Footnotes omitted.)

Two years later, in *Fuller v. Oregon*, 417 U.S. 40 (1974), this Court rejected the argument that "a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus 'chill' his constitutional right to counsel." *Id.* at 51. The Court concluded that a defendant who might later be ordered to repay the costs of his court-appointed attorney is not deprived of his constitutional right to legal assistance, since he receives free counsel when he needs it. *Id.* at 52-53. As the Court explained:

We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise.

A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.

Id. at 53-54. The Court therefore decided that properly drafted recoupment statutes do not unconstitutionally place a penalty on the exercise of a constitutional right, for they have valid purposes and require repayments only from persons who are able to do so. *Id.* at 54.

Thus, this Court has already determined that the right to counsel guaranteed by the Sixth and Fourteenth Amendments does not prohibit a state from enacting a recoupment statute.¹ Instead, these statutes serve legitimate state interests. Recoupment statutes, *per se*, are not so outrageous as to violate due process. *Cf.* Jurisdictional Statement at 5-6.

Appellant suggests, however, that the application of a recoupment statute to an *acquitted* defendant violates due process. Jurisdictional Statement at 5-6. The decisions of this Court do not support that position. The state interest in recoupment statutes set forth above at 5-6 applies to both convicted and acquitted defendants. Although the Oregon recoupment statute under consideration in *Fuller v. Oregon* applied only to convicted persons and the constitutionality of that

¹ In his argument against attorneys fees reimbursement statutes, appellant refers to the American Bar Association's Standards for Criminal Justice, Standard 5-6.2. Jurisdictional Statement at 10. However, the commentary following the standard makes clear that its recommendation against reimbursement is based upon policy considerations rather than constitutional requirements.

classification was upheld, the Court clearly did not hold, or even suggest, that such a limitation to convicted persons was constitutionally required. Furthermore, the comparison in *Fuller v. Oregon* between defendants who are just above the line of indigency and defendants only slightly poorer applies equally well to cases where a defendant is acquitted. See above at 6-7. A non-indigent defendant who is acquitted in a criminal case should not be placed in a worse economic position than someone like appellant.

The Minnesota recoupment provisions are not unusual in their application to all defendants. The federal reimbursement statute, 18 U.S.C. § 3006A(f), does not distinguish between convicted and acquitted persons. See *U.S. v. Durka*, 490 F.2d 478 (7th Cir. 1973) [An acquitted defendant was not deprived of his constitutional rights by an order to pay reimbursement for fees of court-appointed counsel]; *U. S. v. Pinckney*, 491 F.Supp. 82, 84 (W.D. Mo. 1980) ["Assuming good cause for prosecution, the court does not understand why a person who becomes financially able to pay counsel fees should enjoy a lifetime exemption from that obligation. The Federal statute makes no distinction between the successful and unsuccessful defense of prosecution."] The California statute has also been upheld by that state's highest court against a due process challenge to the fact that acquitted defendants may be required to pay reimbursement for counsel fees. *People v. Amor*, 12 Cal. 3d 20, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974).

Finally, appellant refers to Minn. Stat. § 631.48 (1982), which provides that the costs of prosecution may be assessed

against only those defendants who are convicted.² Jurisdictional Statement at 8. Obviously, the Minnesota Legislature could have made a similar restriction in the attorneys' fees reimbursement statutes. But, because of differences between the payment of attorneys fees and the payment of the costs of prosecution, the Minnesota Legislature chose not to limit the attorney reimbursement provisions to convicted defendants. Appellant has failed to establish that this choice violates his constitutional rights.

B. Appellant's Arguments Regarding Procedural Due Process and Equal Protection Were Not Properly Raised and Are Frivolous.

Appellant also suggests that proper hearings were not held and that the recoupment order violates his right to equal protection by failing to provide for the same exemptions that other civil debtors possess. Jurisdictional Statement at 1, 6, 11. Neither of these arguments was raised below. *See* Petition for Writ of prohibition, a copy of which is attached to the Jurisdictional Statement at B-1. Therefore, they should not be considered. *Webb v. Webb*, 451 U.S. 493 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

² Minn. Stat. § 631.48 (1982) provides:

In all criminal actions, *upon conviction of defendant*, in addition to the punishment prescribed and as a part of the sentence, the court may adjudge that defendant shall pay the whole or any part of the disbursements of the prosecution and payment thereof may be enforced in the same manner as the sentence, or by execution against property. When collected, such disbursements shall be paid into the treasury of the county, where conviction was had, but this shall not interfere with the payment of officers', witnesses', or jurors' fees.

(Emphasis added.)

Furthermore, the record does not support appellant's suggestion that he was denied procedural due process. The original order requiring Mr. Lacher to pay attorneys fees was apparently entered at a court hearing. *See* transcript attached to Jurisdictional Statement at F-2. Furthermore, appellant was later given a further hearing to show cause why he had not paid the fees. *See* letter attached to Answer to Petition for Writ of Prohibition, a copy of which is attached to Jurisdictional Statement at C-4. He voluntarily declined that opportunity by not attending the hearing.

Appellant has also failed to support his argument that the Minnesota recoupment statutes violate equal protection because they do not provide for the exemptions given to other civil debtors in Minnesota. The argument is apparently based on *James v. Strange*, 407 U.S. 128 (1972). However, the offending aspect of the Kansas statute in *James v. Strange* provided that, in an action to collect attorneys fees, "[n]one of the exemptions provided for in the code of civil procedure [for collection of other judgment debts] shall apply . . ." Kan. Stat. § 22-4513(a). The Minnesota statutes do not so provide. Since the defendants required to pay reimbursement for attorneys fees receive the same exemptions afforded to other debtors, the violation of equal protection found in *James v. Strange* does not exist in Minnesota. *See Fuller v. Oregon*, 417 U.S. 40, 46-48 (1974).

CONCLUSION

The decision of the Minnesota Supreme Court should not be reviewed by this Court because it is supported by adequate nonfederal grounds. Furthermore, appellant has not raised any substantial federal question to be decided by this Court.

We respectfully ask the Court to dismiss this appeal or, in the alternative, affirm the judgment entered by the Minnesota Supreme Court.

Dated: April 6, 1983.

Respectfully submitted,

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